

No. 5143

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MOULTON MINING COMPANY (a corporation),
CLARK-MONTANA REALTY COMPANY (a corporation),
ELM ORLU MINING COMPANY (a corporation), and J. ROSS CLARK,

Appellants,

VS.

ANACONDA COPPER MINING COMPANY (a corporation),

Appellee.

APPELLANTS' PETITION FOR A REHEARING.

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To the Honorable William B. Gilbert, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellants respectfully petition this honorable court for a rehearing in said cause on questions of law and fact relating to the "Intermediate-View" vein and base their petition on the following grounds:

1. That the uncontradicted testimony of both sides rendered the conclusion of this honorable court inevitable "that the View has not been distinguished

from the Intermediate branch of the Rainbow, and that they must be regarded as one for the determination of extralateral rights within the western segment * * *” (referring to the segment west of the Emily crossing at the 370 foot point) “* * * and thus the Rainbow becomes the apex of the Intermediate for the segment under consideration.” (Opinion, pp. 18-19.) It follows as a necessary and unavoidable corollary that the same logic controls extralateral rights on the “View-Intermediate” vein east of the Emily crossing, as will be pointed out in greater detail hereinafter.

2. This honorable court held in its opinion that so far as the “View-Emily” merged vein is concerned, “the theory of a sub-surface fault apex is not to be lightly put aside. The admitted displacement of the Black Rock fault, even as much as 200 feet, gives countenance to that theory”. (Opinion, p. 18.) This undisputed condition justifies a finding that appellants are entitled to the extralateral segment of the “Intermediate-View” vein east of the 370 foot point.

3. This honorable court did not discuss the contention of appellants, based on appellee’s own testimony, that the “Pilot” branch of the Emily vein admittedly apexed in Poser surface which Pilot apex would necessarily control extralateral rights on the merged “Pilot-Emily-View” vein throughout the easterly 370 feet of the older Poser claim.

We will discuss these three grounds upon which this petition is based in the foregoing order and, thoroughly appreciating the fact that it would be un-

pardonable to trespass unduly upon the time of this honorable court, we will present these propositions in the briefest possible space.

I.

“INTERMEDIATE-VIEW” VEIN MUST BE REGARDED AS ONE FOR THE DETERMINATION OF EXTRALATERAL RIGHTS WITHIN THE EASTERN AS WELL AS THE WESTERN SEGMENT.

It would be superfluous to again call attention in detail to the practically uncontradicted mass of evidence establishing the fact that the “Intermediate” and “View” veins are necessarily one for extralateral purposes. This was done on pages 49-66 of “Brief for Appellants”, and pages 14-16, 29-32 of “Reply Brief for Appellants”. To recapitulate, it was there pointed out that the strike of the “Intermediate-View” vein on the various levels from the 1000 down to the 3000, as disclosed by the exhibits of both sides, was substantially the same; that the dip of this vein throughout 2000 feet remains substantially unchanged; that in spite of the extensive workings throughout this region, both on and in the immediate vicinity of the “Intermediate-View” vein, appellee was unable to point to a *single place* where the “Intermediate”, as distinguished from the “View” vein, was found separated from it in any substantial manner; and, to conclude the matter beyond the possibility of successful denial, their own witnesses testified that throughout these hundreds of feet of strike and dip, where the vein had been actually disclosed in work-

ings beneath Poser surface, the two alleged veins were found "together", "in contact", "combined" so that one could not "definitely distinguish" one mineralization from the other, and based on this occurrence alone one would "expect them to be one vein" without definite proof to the contrary, that one "cannot tell" where the mineralization of one alleged vein ended and the other began. (Brief for Appellants, pp. 54-65.) With this overwhelming and virtually uncontradicted mass of testimony presented by *both* parties, it was inevitable that this honorable court should conclude as it did:

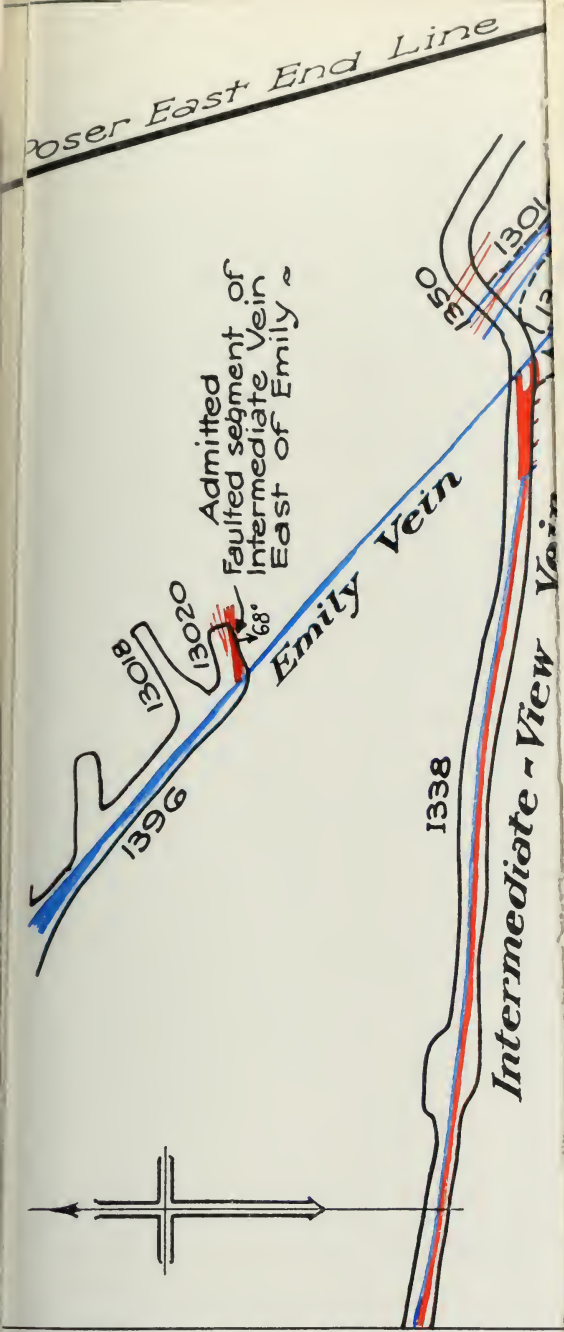
"It is certain that for distances of hundreds of feet there is contact and merger on dip and strike underneath the surface of the Poser claim and within the boundaries of that claim. There is coincidence and union; neither intersection nor crossing, within the meaning of those terms in section 2336, Revised Statutes of the United States. Reading the evidence convinces us that the most reasonable deduction is that the View has not been distinguished from the Intermediate branch of the Rainbow, and that they must be regarded as one for the determination of extralateral rights within the western segment, and that the apex of the Intermediate should be held to be the apex of the View too, and that the Intermediate as a branch of the Rainbow apexes in the Rainbow, and thus the Rainbow becomes the apex of the Intermediate for the segment under consideration." (Opinion pp. 18-19.)

An examination of the maps of both parties will establish the fact that this merged and combined condition of the "Intermediate-View" vein exists in various workings beneath the Poser surface, extending in many places far to the east of the 370 foot

point determined by the Emily crossing, and, on one level, at least, very closely approaches the Poser east end line plane. On the Elm Orlu or Poser 1000 level in the easterly end of the 1060 drift (Pl. Ex. 14, Def. Ex. 100) it is found about 280 feet west of the Poser east end line plane. On the 1300 level in the easterly end of the 1338 drift (Pl. Ex. 16, Def. Ex. 103) *it is only 80 feet from the Poser east end line plane.* On the 1500 level in the 1550 drift appellee contends that the "Intermediate" vein departs from the "View" vein in the vicinity of the 1583 cross-cut, branching to the north, though one of its principal witnesses, Mr. Wiley, found one branch of it coming back to a union with the other branch even further to the east (see pp. 51-53 of "Brief for Appellants"), yet this brings the united vein structure, according to the admissions of all of appellee's witnesses, to within nearly 100 feet of the Poser east end line plane. (Pl. Ex. 18, Def. Ex. 105.) Of course, appellants contend that it actually crosses the Poser east end line on this level. On the 1700 level (Def. Ex. 107) their own map shows the combined structure, according to their own interpretation, approximately 200 feet from the Poser east end line plane. This is further corroborated by their cross section BB (Def. Ex. 121) a portion of which was inserted as Diagram No. 13 in "Appendix to Appellants' Brief". We have then throughout this area the combined structure admittedly approaching the Poser east end line plane at varying distances, from 80 to 200 feet therefrom. Even on the 1500 level where Mr. Wiley testified that at least one branch of the alleged north departing

“Intermediate” vein came back and joined the alleged “View” vein (Tr. Wiley 1713, 1811, 1818-1819; also see Brief for Appellants pp. 51-53), the trial court has the same mental reservation as that expressed by Mr. Wiley. The court says, “at 1583 cross-cut, the Intermediate vein reduced in size, in larger part *if not all*, departs northeasterly from 1550 drift”. (Tr. p. 2248.) There is here expressed a very decided doubt and a mental reservation that a part, at least, of the “Intermediate” vein may continue on, as was testified to by Mr. Wiley, to a reunion with what appellee claims to be the “View” vein near the head of 1736-A raise right at the east end line plane of the Poser claim.

When we take into consideration the uncontradicted fact that the “Intermediate” vein joins the Rainbow vein and merges with it, and that though it was incumbent on appellee to show its alleged “View” vein separating from the Intermediate vein and crossing through the Rainbow vein at these points of admitted junction, which it utterly failed to do, the significant and vital bearing of this situation which has just been brought out will become apparent. This honorable court held in its opinion that in view of the hundreds of feet of contact and merger of the Intermediate and View vein structure on strike and dip “there is coincidence and union; neither intersection nor crossing”. The inescapable logic of this situation carries us to another conclusion which is equally inevitable and inescapable. This is best illustrated by the Elm Orlu or Poser 1300 level. We have prepared a diagram taken from the exhibits of both



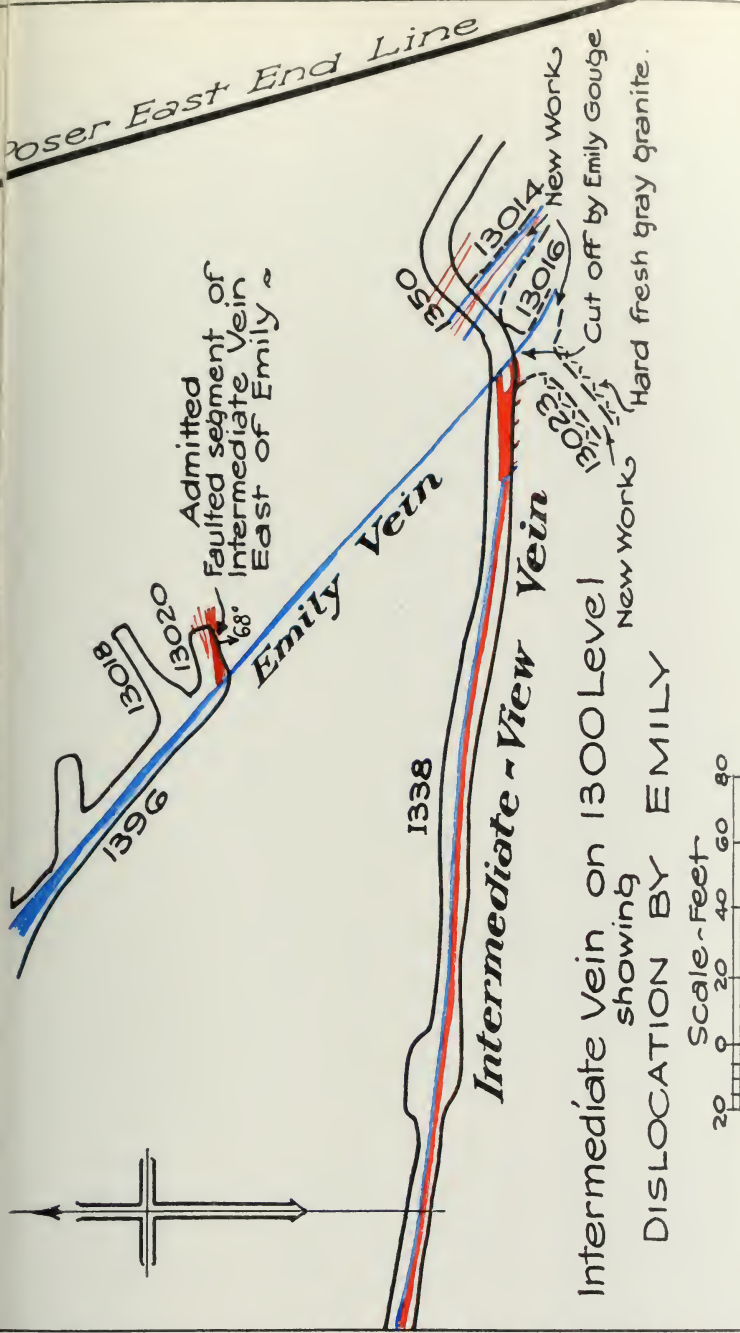
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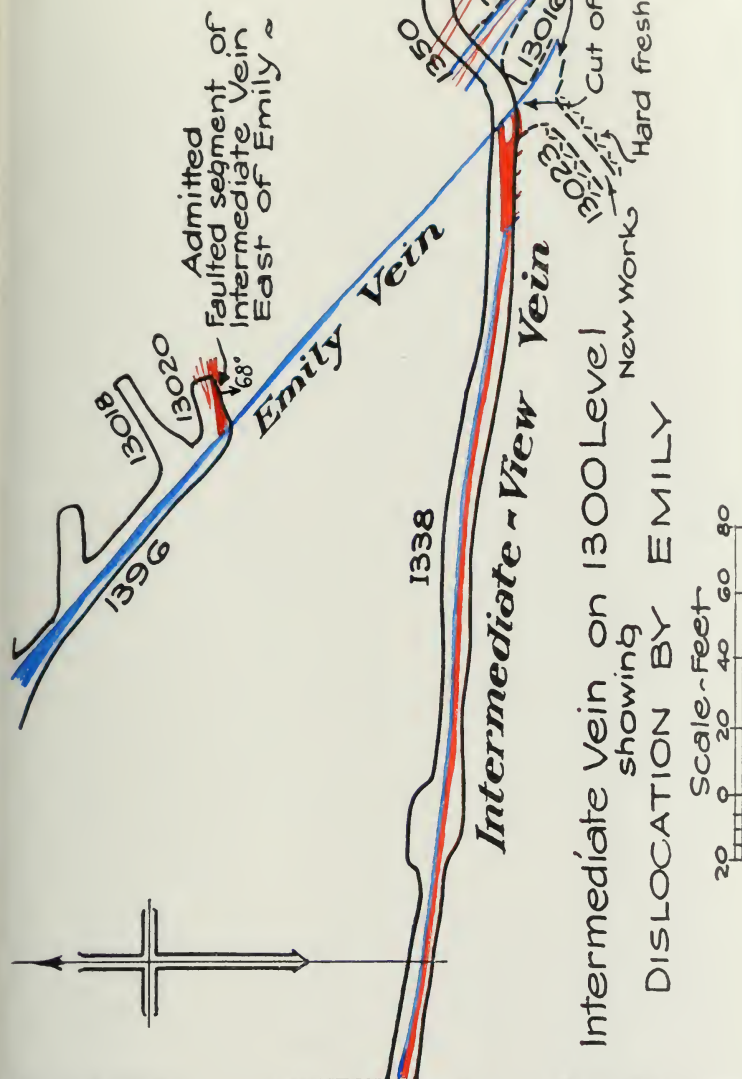
The combined Intermediate-View vein structure on this level reaches within approximately 80 feet of the Poser east end line plane in 1338 drift and the admitted faulted segment of the Intermediate vein is also disclosed in 13020 drift east of the Emily vein thus establishing the senior Poser claim right to the eastern extralateral segment of the Intermediate-View vein.

Diagram No.
1-A

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Poser East End Line



The combined Intermediate-View vein structure on this level reaches within approximately 80 feet of the Poser east end line plane in 1338 drift and the admitted faulted segment of the Intermediate vein is also disclosed in 13020 drift east of the Emily vein thus establishing the senior Poser claim right to the eastern extralateral segment of the Intermediate-View vein.

Diagram No.

1-A

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sides illustrating this situation, here inserted as Diagram No. 1-A. This shows the "Intermediate" vein, or as appellee would designate it the "Intermediate-View", extending easterly in the 1338 drift to the point where it encounters the Emily vein about 80 feet west of the Poser east end line. On the east side of the Emily vein is shown on this diagram the vein segment in 13020 drift admitted by both parties to be the easterly and faulted continuation of the Intermediate vein, this easterly segment having been dislocated and moved approximately 140 feet northwest by the Emily faulting. (Lawson, Tr. 1912.) This disclosure was made during the progress of the trial and is, therefore, not found portrayed on the main exhibits but will be found on Defendant's Exhibit 170, a sketch by Mr. Sales (appellee's witness), introduced toward the close of the trial. The witnesses on both sides agree that this disclosure in 13020 drift is the faulted segment of the Intermediate vein. (Lawson, Tr. 1876-7, 1910; Simkins, 1926; Burch, 1965; Mead, 2011; Roddewig, 2052; Sales, 2173; Bateman, 2194; Barker, 2208; Steele, 2216; Wiley left before this disclosure was made.)

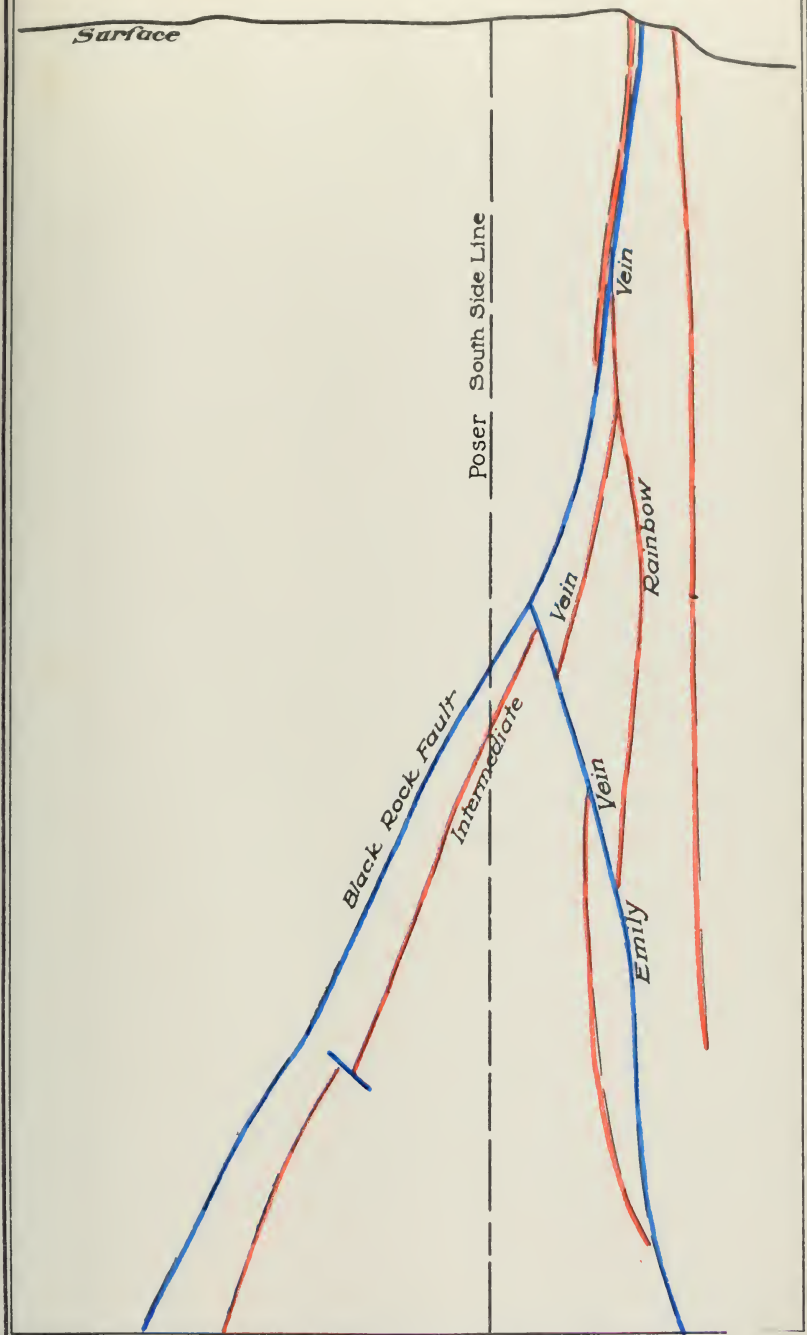
Appellee in its brief filed here on appeal freely admits that the "13020 drift was driven on what both sides agree to be the Intermediate vein on the hanging-wall side of the Emily * * *". (Brief for Appellee, p. 302.)

This eastern segment of the Intermediate vein is only exposed in 13020 drift for about 20 or 30 feet in length but the dip is stated by witnesses of both sides to be about 68° or 70° to the south (Simkins,

Tr. 1926; Lawson, 1910, 1916; Burch, 1964; Mead, 2011; Roddewig, 2052; Sales, 2172; Barker, 2208; Steele, 2216) which is the average dip of the "Intermediate-View" vein for some 2000 feet of its downward course. There was great difference of opinion as to the strike of this segment, witnesses for appellants contending that it was nearly east and west or slightly south of east (Lawson, Tr. 1910; Simkins, 1926; Burch, 1964; Mead, 2011, 2031; Roddewig, 2052), while witnesses for appellee contended that its strike was more northeasterly. (Sales, Tr. 2172; Bateman, 2194; Barker, 2208; Steele, 2216.) In any event it is quite evident that the strike of the first few feet of a vein segment, abutting against another faulting vein, where the movement is admitted to be as much as 140 feet, would almost certainly show a pronounced drag or curl as it hits the Emily. (Lawson, Tr. 1916.)

The strike of the westerly segment of the Intermediate vein for several hundred feet on the west side of the Emily on this 1338 level is slightly south of east, as shown on Diagram No. 1-A hereinbefore inserted. We have then this segment of the Intermediate vein on the east side of the Emily dipping normally 68° or 70° to the south, so that on its rise or upward course it will inevitably encounter the Rainbow vein and join with it long before reaching the surface, so that the Rainbow apex will control extralateral rights on this segment out to the east end line of the Poser claim. An examination of Diagram No. 14 of "Appendix to Appellants' Brief" will show the position of the Rainbow apex in the

N-S CROSS SECTION
Near East End Line of POSER CLAIM
As shown on Celluloid Model.
(Plaintiff's Exhibit No.90)



Cross-section near Poser east end line plane which establishes that Rainbow vein apex in the senior Poser claim controls extralateral rights in eastern segment of Intermediate-View vein.

Diagram No.

2-A

eastern portion of the Poser claim as represented by appellee and an examination of appellee's 1300 level map (Def. Ex. 103) will establish the fact that the Rainbow vein is found further to the north on this 1300 level than it is on the surface, so that we have in this portion of the Poser claim the Rainbow apex actually overhanging to the south its position on the lower levels down as far as the 1300. It is inevitable that the Intermediate vein will reach the Rainbow vein and unite with it long before coming to the surface. This situation is illustrated on Diagram No. 2-A inserted herein, which is a cross-section near the east end line of the Poser claim and which is one of the sections appearing on the small celluloid model (Pl. Ex. 90) consisting of several sheets introduced by Dr. Lawson, representing vertical sections passed through this area and establishing the relationship just mentioned. (Tr., Lawson, 928-929, 930-932.) Dr. Mead also corroborated Dr. Lawson on this point and testified that the Rainbow was the apex of the Intermediate. (Tr., Mead, 684, 686, 690.) There is no substantial testimony to the contrary. This is consonant with this honorable court's conclusion that the Intermediate vein joins the Rainbow and is a branch of it in other parts of the claim (Opinion, pp. 18-19) and that extralateral rights on the Intermediate vein are controlled by Rainbow apex west of the Emily apex crossing.

Mr. Steele, one of appellee's witnesses, admitted on cross-examination that in his opinion this faulted easterly segment of the Intermediate vein would cross the Poser east end line plane. (Tr., Steele, 1632.)

Sales, also for appellee, introduced a sketch showing this eastern segment of the Intermediate projected almost to the Poser east end line. (Def. Ex. 171.)

We have then the conclusion based largely upon testimony of appellee's own witnesses that the Intermediate vein is disclosed east of the Emily, and will extend across the Poser east end line plane and with a normal dip of 68° or 70° to the south that will inevitably and necessarily result in its joining the Rainbow and apexing with the latter in the Poser claim.

The Intermediate and "View" Vein Structures West of the Emily Vein in the 1338 Drift Cannot Be Disassociated and All of this Vein Structure is Cut Off Sharply by Emily Structure.

In our "Opening Brief for Appellants" (pp. 121-127) we pointed out the fact that the testimony overwhelmingly established the clean sharp cut-off of *all* vein structure both Intermediate and "View" by the Emily in the easterly end of the 1338 drift. As we there pointed out, counsel for appellee on cross-examination tried to get appellants' witnesses to admit that there was a departure of certain vein structure from the 1338 drift just before it encountered the faulting Emily structure, and his examination was directed to an appearance of such departure shown on Plaintiffs' Exhibit No. 16, of the Poser 1300 level, which situation appears on Diagram No. 1-A hereinbefore inserted, and also on Diagram No. 22 of "Appendix to Appellants' Brief." When appellee's witnesses Bateman, Barker and Steele were on the stand, before appellants had done the new work shown on Diagram No. 1-A hereinbefore in-

serted, they all testified to the fact that certain vein structure did turn out of the drift at this point south-erly becoming parallel with the strike of the Emily vein, and Mr. Barker even testified positively to such departing mineralization "joining" with the Emily structure. It is obvious that they were trying to show their "View" vein structure departing from the Intermediate at this point. Thereafter, the new work shown on Diagram No. 1-A was run by appel-lants, particularly cross-cut 13023. All of appellants' witnesses on rebuttal testified to the effect that none of this vein structure departing from 1338 drift ap-peared in the 13023 cross-cut, which it must inevitably cross in order to reach the Emily structure, but that it had died out or turned back into 1338 drift without even appearing in this new cross-cut, and that *all* of the vein structure, both Intermediate and "View" was clearly and sharply cut off by Emily structure in the 1338 drift. *These facts stand without contra-diction; none of appellee's witnesses even mentioned the situation on sur-rebuttal; it was a vital part of their case and the only plausible explanation of their silence is that there was no way in which they could answer these obvious facts.* Appellee did make a lame excuse that this work was done so near the end of the trial that they did not have proper opportunity to examine it. It had a large number of representa-tives from their geological staff available at all times for the examination of this work and it was familiar with the testimony given by appellants' witnesses as to this feature and yet it did not attempt to answer

it nor to ask the court for additional time in which to attempt to overcome this showing.

We again at this juncture call attention to the inconsistency of the trial court in holding as it did in the "*Elm Orlu*" case, 233 Fed. 547, 570, that if one point of clean cut crossing of one vein by another is established, it will destroy appearances of union and merger "at many places", because subsequent healing and cementation may destroy this evidence of crossing in these "many places". We cannot refrain from again commenting on the fact that the trial court was influenced to find a junction of the "View" and Emily veins because of a comparatively few feet of contact of the two mineralizations occurring in branches only of the main veins and entirely east of the Poser end line plane *occurring at one place only* and yet this same court utterly ignored and refused to be influenced by hundreds upon hundreds of feet of contact and merger between the Intermediate and "View" veins entirely within Poser boundaries.

To sum up: Appellants' contention is that the overwhelming weight of evidence, including the testimony of appellee's expert witnesses that they cannot distinguish one vein structure from another supports and confirms the conclusion of this honorable court that the Intermediate and "View" veins are one for extralateral purposes west of the Emily apex crossing (also referred to as the 370 foot point); that if this is the fact west of this point, it cannot be otherwise than the fact east of this point, for these same witnesses admitted the same appearance of "contact", "combining" and "merger" of the two structures

east of this 370 foot point on level after level, as already pointed out, and particularly on the 1300 level to within 80 feet of the Poser east end line plane. When we take into consideration the fact that we have a clean cut-off of *all* of this structure not successfully disputed by appellee on this 1300 level, and find a continuation of this same vein structure on the easterly side of the Emily exactly where the witnesses for both sides testified they would expect to find a continuation because of the admitted throw by the Emily, and when this easterly segment is so situated that it must inevitably cross the Poser east end line plane and also on its upward course join the Rainbow vein, and therefore be controlled as far as extralateral rights are concerned by the Rainbow apex, then how is it possible to escape the conclusion that this Rainbow apex controls the segment of the vein in controversy, call it "View" or "Intermediate", beyond the Emily crossing at the 370 foot point clear out to the Poser east end line extralateral plane?

Even if we assume, what is contrary to the uncontradicted evidence, that all the vein structure in 1338 drift is not cut off by the Emily, and that, as appellee would contend, that the "View" vein structure joins the Emily and only Intermediate vein structure is found to the east of the Emily in 13020 drift, yet the unanswerable logic of the situation is as follows: This easterly Intermediate segment crosses the Poser east end line, joins and apexes with the Rainbow, is admitted to be a continuation of the Intermediate found in 1338 drift on the other side of and to the west of the Emily. It is found by this court to join with and

form a union with the "View" vein in this 1338 drift and throughout these workings on the 1000, 1300 and 1500 levels. There is, therefore, no escape from the fact that the Intermediate-Rainbow merged vein apex controls right down through this easterly "View" vein segment out to the Poser east end line plane. The dislocation of 120 or 140 feet of the Intermediate by the Emily cannot destroy this correlation and identity if the 160 to 200 foot dislocation by the Black Rock fault does not have the effect of destroying it further down.

Therefore, even if the "Intermediate-View" vein has an apex in the Emily for the easterly 370 feet of the Poser claim, it also necessarily apexes with the Rainbow for this same distance and the senior Poser rights control this easterly extralateral segment.

II.

THE SUB-SURFACE FAULT APEX OF THE VIEW-EMILY MERGED VEIN CREATED BY THE BLACK ROCK FAULT JUSTIFIES APPELLANTS' CLAIM TO THE EASTERLY 370 FOOT EXTRALATERAL SEGMENT OF THE INTERMEDIATE-VIEW VEIN.

As already pointed out, this honorable court said, "It may be that where the merged vein is against the Black Rock fault on the footwall side that it ends there, and that an extension upward above the fault cannot be found. If this be so, the theory of a sub-fault apex is not to be lightly put aside," and added that this admitted displacement of 200 feet by the Black Rock fault "gives countenance to that theory". (Opinion, p. 18.) But the opinion does not give us the benefit of the court's reasoning in failing to grant

this easterly extralateral segment to appellants. We can add little to our previous discussion of this situation found on pages 32-44 of "Brief for Appellants" and the diagrams in the "Appendix" applicable to this discussion. This vein admittedly abuts against the fault, as appears from all of the appellee's cross-sections, and having admitted that this vein is found in this position beneath Poser surface "it devolved upon defendant, endeavoring to deny the extralateral rights, to overcome the showing made". (Opinion, p. 18.)

III.

THE PILOT VEIN APEX IN THE SENIOR POSER CLAIM CONTROLS THE EXTRALATERAL RIGHT OF THIS EASTERN SEGMENT OF THE INTERMEDIATE-VIEW VEIN.

As we have also pointed out in "Brief for Appellants", pages 28-31, the admitted position of the vein apex, called "Pilot" by appellee, being according to its contention a branch of the Emily, would necessarily control extralateral rights on the easterly segment of the Intermediate-View vein because the latter is also, according to the finding of the trial court, a branch of the Emily. The diagrams accompanying this argument found in the "Appendix" illustrate this particular argument and, as appears on appellee's Section BB, Diagram No. 4 (Def. Ex. 121), the Pilot and Emily veins are found in practical union right at the abutment on the hanging wall side of the Black Rock fault and the relationship of the dips of the two segments is such, as appears on this cross-section, that they must inevitably unite. Assuming that the 200 foot throw on the Black Rock fault can

be bridged we find only the single Emily vein abutting against the fault underneath, which is consistent with the theory of the junction of the Pilot and Emily veins. The Intermediate-View vein will merge with the Emily before it reaches the fault. How then is it possible to escape the conclusion that the Pilot apex in Poser ground, which is admittedly the senior claim, controls the extralateral right on the Intermediate-View vein? If the Emily vein apex found in appellee's Millview claim to the south of the Poser is the apex of the merged vein below, as the trial court found, so also is the apex of the Pilot vein another apex of the merged vein below, *and the senior right prevails*. It should be observed that this Section BB is east of the Emily apex crossing, as appears on Diagram No. 5 of "Appendix to Appellants' Brief".

For the reasons above given appellants respectfully submit that this petition for a rehearing be granted.

Dated, San Francisco,

February 1, 1928.

Respectfully submitted,

WM. E. COLBY,

W. A. CLARK, JR.,

J. L. TEMPLEMAN,

JOHN C. HIGGINS,

*Attorneys for Appellants
and Petitioners.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
February 1, 1928.

WM. E. COLBY,
*Of Counsel for Appellants
and Petitioners.*

